

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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IN RE THE MARRIAGE OF

MICHAEL A. DAVIS,  
*Respondent/Appellant,*

*and*

TRACY R. DAVIS,  
*Petitioner/Appellee.*

No. 2 CA-CV 2016-0011  
Filed September 23, 2016

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THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
NOT FOR PUBLICATION  
*See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).*

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Appeal from the Superior Court in Pima County  
No. D20071773  
The Honorable Lori B. Jones, Judge Pro Tempore

**AFFIRMED**

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COUNSEL

About & About, P.C., Tucson  
By Michael J. About and John Eli About  
*Counsel for Respondent/Appellant*

Gilbert Law Firm, PC, Tucson  
By Thea M. Gilbert  
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**MEMORANDUM DECISION**

Judge Espinosa authored the decision of the Court, in which Presiding Judge Howard and Judge Staring concurred.

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ESPINOSA, Judge:

¶1 Appellant Michael Davis appeals the trial court's order, entered after a post-dissolution review hearing, determining he was current on child support payments and owed no arrearages. Michael argues the court erred in not finding he had overpaid his support obligation, not ordering his former wife, Tracy, to execute Internal Revenue Service (IRS) documents allowing him to claim their children as dependents on his 2014 tax return, and in failing to award him attorney fees and costs. For the reasons that follow, we find no abuse of the trial court's discretion and therefore affirm its rulings.

**Factual and Procedural Background**

¶2 We view the facts in the light most favorable to sustaining the trial court's ruling. *Bell-Kilbourn v. Bell-Kilbourn*, 216 Ariz. 521, n.1, 169 P.3d 111, 112 n.1 (App. 2007). The marriage between Michael and Tracy Davis was dissolved in 2008. The dissolution decree ordered joint custody of the two minor children, and required Michael to pay Tracy child support and spousal maintenance. Michael's child support obligations were modified four separate times between 2007 and 2011, and in 2014 he filed another petition to modify child support and "to determine child support arrearages, if any." The trial court ordered an accounting on the issue of arrearages, and Tracy submitted an "Arrears Calculation Report" from the Department of Economic Security (DES), Division of Child Support Enforcement.<sup>1</sup> The DES report

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<sup>1</sup>Pursuant to A.R.S. § 46-441(B) all child support and spousal maintenance payments are processed through a support payment clearinghouse.

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concluded that as of December 31, 2014, Michael was over \$8,000 in arrears on his child support payments. Pursuant to A.R.S. § 25-510(B), the accounting was admitted as prima facie evidence of all payments made and received.

¶3 To rebut the evidence Tracy had presented, Michael retained a former IRS auditor, Guadalupe Aguirre, to conduct a forensic accounting of the DES records. After Michael objected to a continuance so Tracy could consider whether she wanted to retain her own expert, the court ordered that Aguirre provide a “report regarding the issue of arrearages from the information [Michael] has provided to her.” The court also ordered Tracy to “provide any additional information to [Aguirre] that may be necessary.”<sup>2</sup> Following a meeting in which Tracy expressed concerns regarding the accuracy of the allegedly missing payments by Michael and Aguirre’s failure to calculate interest, Aguirre submitted a supplemental report that stated “DES’s conclusions [were] totally erroneous” and that Michael had overpaid his support by more than \$5,000.

¶4 In her supplemental report, Aguirre explained she had included in her calculation payments Michael had made but that had not appeared in the DES records. She further explained that she informed Tracy she “had seen the original bank statements to verify that those checks had actually cleared through his bank.” Attached to the report were copies of the fronts of several cancelled checks, but not the backs of the checks or any bank statements indicating

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<sup>2</sup>Although Michael characterizes Aguirre as “an independent auditor” appointed by the trial court, the record suggests that characterization is inaccurate. Aguirre was hired by Michael to rebut the DES accounting and it was only after Tracy indicated interest in obtaining her own expert and Michael objected to continuing the proceedings that the court ordered that Aguirre meet with Tracy “regarding the issue of arrearages.” In a supplemental report, Aguirre noted Tracy’s concerns but stated she had provided no new information and “st[oo]d on the conclusion . . . reached in [her initial] report,” that Michael had overpaid support.

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they had been processed. Nor did the report provide a month by month computation of support arrears, or calculate interest on any payments above or below the amounts required. Before the close of evidence, Michael submitted another exhibit that purported to show ten additional payments missing from the clearinghouse records but not considered in the expert accounting, thus bringing his total alleged overpayment to more than \$10,000.

¶5 The trial court took the matter under advisement, stating it would “sit down and go through the numbers” and determine “what was owed or not owed.” In a November 2015 ruling, the court found Michael current on his child support and “no child support arrearages [we]re due to [Tracy].” Regarding the seventeen checks Michael had relied on to show he had overpaid, the court concluded he had not “sustain[ed] his burden that these monies were ever processed through the Clearinghouse.”

¶6 Michael filed a “Request for Additional Rulings,” based on the trial court’s finding him not in arrears, to compel Tracy to amend her 2014 income tax return and execute “IRS Form 8332” so that Michael could claim both children as dependents for tax year 2014.<sup>3</sup> The court denied the request, finding Tracy had “acted reasonably and in good faith when she claimed both children on her tax returns for the 2014 year.”

¶7 Upon final resolution of all pending claims, Michael filed a Notice of Appeal challenging the November 2015 ruling that no child support had been overpaid and denying attorney fees, and the court’s subsequent determination that Tracy need not execute IRS forms allowing Michael to claim the children as dependents. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(2).

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<sup>3</sup>Under the 2012 Order, Michael was entitled to claim the children as dependents if “he has paid all child support and arrears” by the end of the year.

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**Child Support Arrearages**

¶8 Michael acknowledges the clearinghouse records are prima facie evidence of all child support and spousal maintenance payments made, but he argues the evidence he presented “rebutted the presumption” that the DES records accurately reflected the payments he had made. He characterizes the trial court’s “reject[ion of] much of [the] impartial expert analysis” and failure to give him credit for any of the seventeen checks not shown on the clearinghouse record as “an absolute abuse of discretion.”

¶9 On review, we examine the evidence in the light most favorable to upholding the trial court’s decision, *Little v. Little*, 193 Ariz. 518, ¶ 5, 975 P.2d 108, 110 (1999), and will not disturb its factual findings unless clearly erroneous, *Alley v. Stevens*, 209 Ariz. 426, ¶ 6, 104 P.3d 157, 159 (App. 2004). A trial court abuses its discretion if the record is devoid of competent evidence to support its decision, *Little*, 193 Ariz. 518, ¶ 5, 975 P.2d at 110, or the court commits legal error in reaching a discretionary conclusion, *Rasor v. Nw. Hosp., LLC*, 239 Ariz. 546, ¶ 22, 373 P.3d 563, 570-71 (App. 2016).

¶10 As the payor, Michael had the burden of proving payments. A.R.S. § 25-510(B), (G); see also *Lopez v. Lopez*, 125 Ariz. 309, 310, 609 P.2d 579, 580 (App. 1980). As noted above, Michael’s expert concluded that through the end of April 2015, Michael had overpaid his support obligations by \$5,629.03. Tracy objected both to Aguirre’s methods of calculating arrears and verifying payments, but the trial court nonetheless admitted the reports into evidence. In its subsequent under-advisement ruling, however, the court rejected Aguirre’s accounting and relied instead on “support payment clearinghouse records dated October 22, 2015” as unrebutted prima facie evidence of Michael’s payments. As for the checks included in the accounting, the court noted that although Michael had provided copies of the fronts of the checks he requested credit for, they lacked an identifying DES “atlas number[,]” and he had not provided the backs of the checks.

¶11 On appeal, Michael argues the trial court wrongfully denied him credit for the additional payments because “[t]he payee

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of every one of the 17 checks was the Clearinghouse,” “[t]he check numbers corresponded with the entries on [his] monthly bank statements,” and “[t]here was no evidence whatsoever that any person or entity other than the Clearinghouse could have negotiated the checks.” Michael asserts he produced bank statements for the seventeen payments showing the “amounts thereof[] had indeed been deducted from his bank account,” but he provides no citation to the record.<sup>4</sup> Instead, he merely contends, again without reference to the record, that his expert “confirmed [the deductions] with her audit.” The transcript of the review hearing reflects that when the court asked Aguirre what exhibits she had reviewed, she replied, “[t]he ones that are attached to my report . . . I reviewed the bank statements, reviewed canceled checks . . . . I reviewed the clearinghouse records [and] . . . the DES records.” As noted earlier, however, no such bank statements are attached to the expert’s report or evident in the record, and it is therefore unclear what documents the expert reviewed in concluding payments had been made.

¶12 Michael next argues that any concern about the negotiation or reliability of the checks due to the fact that he had not provided the expert with copies of the backs of those checks and none had been included in her report, was “illogical.” He asserts the trial court “knew or should have known that National Bank’s monthly statements did not then and still do not include the actual cancelled checks.” But Michael provides no support for this assertion, nor does he cite to any part of the record that reflects what the court “knew or should have known” about his bank’s policies regarding disclosing checks reflected on monthly statements.

¶13 In addition to implicitly rejecting the proffered checks, the trial court noted that twelve of them pre-dated an August 2008 ruling in which specific findings of arrearages had been made. Observing that many of the allegedly missing payments “should have been disclosed” prior to the August 2008 arrearages

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<sup>4</sup>The only bank records that appear in the appellate record are from August and September of 2007, for which there are no corresponding checks made payable to the DES clearinghouse.

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determination, the court concluded that it “cannot and w[ould] not unilaterally reach back to reconsider th[o]se checks.” Michael points out the court “instructed [Aguirre] that the [arrearages] analysis should start from the beginning in 2007.” He argues that because the court admitted evidence of payments made before the August 2008 arrearages ruling, it erred by not considering the National Bank records of payments that “[he] and his counsel went to a great deal of trouble and expense to get.” Michael again provides no support for this argument, and we decline to find his evidence credible simply because it was submitted to the trial court.

¶14 As Michael correctly points out, a trier of fact may disregard expert opinion evidence when it is equivocal, contradicted by other expert testimony, or its factual predicates are disputed, or when common experience or conflicting lay testimony provides a basis of disbelief. Morris K. Udall et al., *Law of Evidence* § 25 (3d ed. 1991). Because the trial court found the factual predicates for the expert’s accounting to lack credibility,<sup>5</sup> and the evidence, as well as lack thereof, supports that finding, we cannot say the court abused its discretion.<sup>6</sup>

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<sup>5</sup>Assuming the expert relied on evidence provided by Michael, it is notable that in a previous ruling the trial court observed, “considering all of the various shortcomings in [Michael’s] candor, believability, demeanor and the reasonableness of his testimony,” it “is generally not credible, candid or reliable.”

<sup>6</sup>We note the clearinghouse records dated October 22, 2015, upon which the trial court relied, do not appear in the appellate record. But neither party challenges the accuracy of that accounting, and we presume the court’s findings are supported by any missing portions of the record. *Walker v. Walker*, 18 Ariz. App. 113, 114, 500 P.2d 898, 899 (1972); *see also Ferrer v. Ferrer*, 138 Ariz. 138, 140, 673 P.2d 336, 338 (App. 1983) (finding no abuse of discretion when “the information reviewed by the court” “not furnished in the record”). To the extent Michael challenges the accuracy of the accounting in his reply brief, we find the argument waived. *See In re Marriage of*

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**Tax Exemptions**

¶15 Michael next argues the trial court erred by not ordering Tracy to execute IRS forms allowing him to claim his children as tax exemptions for 2014.<sup>7</sup> In its February 2012 child support order, the court permitted Michael to claim either one or both of his children as tax exemptions provided he was current on his child support obligation by the end of the year. In its November 2015 ruling, the court did not make any specific end-of-year determinations, but only concluded no arrearages were due as of October 22, 2015. In response to Michael's "Request for Additional Rulings," the court specifically denied his request that Tracy be required to execute "IRS Form 8332," finding she had "acted reasonably and in good faith" when she claimed both children as dependents on her tax return for 2014. Michael contends the court's ruling lacked "any mathematical analysis or findings concerning his many years of payments," and was "clearly an abuse of discretion."

¶16 As we noted earlier, a trial court abuses its discretion if it commits legal error or the record lacks substantial evidence in support of its ruling. *Rasor*, 239 Ariz. 546, ¶ 22, 373 P.3d at 570-71. We review the court's conclusions of law de novo, *Alley*, 209 Ariz.

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*Hinkston*, 133 Ariz. 592, 595, 653 P.2d 49, 52 (App. 1982) (issues raised for first time in reply brief normally not considered).

<sup>7</sup> Although Michael alleges error in refusing to compel execution of IRS forms for both "2014 and 2015 tax years," he has failed to develop any meaningful argument concerning tax year 2015 and his argument as to that year is therefore waived and we do not address it. *See* Ariz. R. Civ. App. P. 13(a)(7) (argument must contain "[a]ppellant's contentions concerning each issue presented for review, with supporting reasons for each contention, and with citations of legal authorities and appropriate references to the portions of the record on which the appellant relies"); *see also Polanco v. Indus. Comm'n*, 214 Ariz. 489, n.2, 154 P.3d 391, 393 n.2 (App. 2007) (failure to develop and support argument waives issue on appeal).

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426, ¶ 6, 104 P.3d at 159, and reach our own legal conclusions based on facts found or implied by the trial court, *McNutt v. McNutt*, 203 Ariz. 28, ¶ 6, 49 P.3d 300, 302 (App. 2002).

¶17 In its November 2015 ruling, the trial court stated it had relied on the support clearinghouse records as prima facie evidence of all payments. In the Arrears Calculation Report dated January 30, 2015, the accounting concluded Michael was in arrears by over \$8,000 at the end of 2014. As discussed above, the trial court properly could determine Michael failed to meet his evidentiary burden to rebut the presumptive accuracy of the clearinghouse records. And because there is evidence that Michael was in arrears at the end of 2014, we cannot say the court abused its discretion in not ordering Tracy to execute IRS Form 8332 for tax year 2014.

**Attorney Fees**

¶18 Michael lastly argues “Tracy’s blatantly-erroneous position that [Michael] was in arrears more than \$218,000<sup>8</sup> and her failure to conduct any independent analysis of the support situation warrants an award of attorney fees and payment of [the expert].” Michael acknowledges trial courts have discretion in awarding fees and costs, but argues the court’s “refusal to require Tracy to contribute even one penny was a clear abuse of that discretion.” That is the correct standard of review and we consider whether the trial court’s determination was such an abuse. *See Heller v. Heller*, 7 Ariz. App. 298, 300, 438 P.2d 445, 447 (1968).

¶19 At the final hearing on the arrearages issue, Michael asserted that Tracy had “failed to make any effort at all to ascertain the whereabouts” of the allegedly missing funds. Tracy disagreed that it was her burden to locate missing payments and noted that she had subpoenaed “child support enforcement” to explain “why there are allegedly \$10,000 in payments that were never credited,” but the state’s motion to quash the subpoena had been granted.

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<sup>8</sup>Michael provides no citation to the record that demonstrates Tracy made such a claim.

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¶20 To the extent Michael suggests Tracy “wrongfully accused him” and “made no effort to verify her claim,” we again note that the presumptive evidence in this case showed Michael was in arrears on his child support obligations. And it was Michael who initiated the current action by filing a Motion for Order to Appear, in which he admitted “he has fallen in arrears in child support to [Tracy] in the amount of \$6,691.” Michael additionally asserts the court erred by denying him attorney fees because Tracy had taken the “unreasonable position” that he was in arrears in excess of \$200,000. Tracy notes that this allegation lacks support in the record and asserts it is “blatantly false.”

¶21 The trial court made no specific finding of fact on the issue of attorney fees, but did note there was no financial disparity between the parties or unreasonable positions taken. Because there is little to no support in the record for Michael’s various allegations, we cannot conclude the court abused its discretion in denying him an award of attorney fees.

¶22 Michael also asserts the trial court erred by denying his request that Tracy contribute toward the cost of the “independent auditor.” However, as previously discussed, the auditor was hired by Michael to rebut the DES accounting, and was ordered by the trial court to meet with Tracy only after Michael objected to Tracy’s request for a continuance to consider retaining her own expert. Tracy complained about Aguirre’s “questionable methodology,”<sup>9</sup> and the court ultimately found the reports did not rebut the accounting provided by DES. Under the circumstances, we cannot

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<sup>9</sup>Tracy challenged Aguirre’s conclusion that Michael had overpaid his support obligations, calculated by subtracting the amount Michael alleged he had paid from the total amount of support due as of the first ordered support payments. Tracy specifically objected to the lack of a month-by-month analysis of the arrearages, and the failure to calculate interest on any overdue balances or judgments, as required by § 25-510(E), and paid by Michael in previous years.

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conclude the court abused its discretion in failing to assign any expert costs to Tracy.

¶23 Both parties have additionally requested attorney fees on appeal, citing A.R.S. § 25-324. As noted above, the trial court previously found no substantial disparity of financial resources between the parties, and nothing in the record alters that finding. Because we conclude neither party has taken an unreasonable position on appeal, in our discretion we deny their requests and each party shall bear its own attorney fees on appeal.

**Disposition**

¶24 For the foregoing reasons, the trial court's rulings are affirmed.